resultant risks of major steam explosions, electric explosions and gas explosions, and sewer and water main breaks. Such incidents may have major effects on life, property, the environment and public health and safety.

In the event of significant claims, municipalities are often sued together with anyone else who might potentially be responsible. Of particular concern to municipalities is that they often become "target defendants" particularly if there is a proliferation of new telecommunications providers in the public ways with few assets and little, if any, insurance. As this Commission is aware, under the laws of many states if there are multiple tortfeasors one defendant often can be held liable for the entire amount of any judgment in favor of a plaintiff. Thus, local units of government face the prospect that they can end up paying the entire amount of any damage claim relating to activities of telecommunications providers in the public ways even if the municipality is only 1% responsible. This is particularly a risk where a telecommunications provider has few or no unencumbered assets. As a result, municipalities must take adequate protective measures. These protective measures include, among other things, placing adequate insurance, indemnity, cost reimbursement and bond/letter of credit provisions in the laws, ordinances and agreements governing telecommunications providers operations in the public rights-of-way.

This Commission has expressly acknowledged such types of measures are appropriate municipal action in the Classic Telephone[14] case, where it said that "examples of the types of restrictions that Congress intended to permit under Section 253(c) includ[ed]

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[14] In re Classic Telephone, Inc., FCC 96-397 (October 1, 1996) ("Classic Telephone").

. . . requir[ing] a company to indemnify the City against any claims of injury resulting from the company's excavation" Classic Telephone, at ¶ 39 (citation omitted). Otherwise it is the municipality's general fund and its residents and taxpayers who have to pay for the harm caused by the misconduct of a telephone provider.

The need for such indemnities, if anything, is made more acute by the Telecommunications Act of 1996 ("1996 Act"). This is because to the extent that the 1996 Act removes discretion on the part of municipalities in terms of who they may and may not allow in the public rights-of-way, it both (1) increases the number of providers and utilities, thus increasing the likelihood of disruption, and (2) potentially diminishes a municipality's ability to exclude shoddy or unscrupulous providers who will not take the steps necessary to minimize the chance of problems.

At the present time (and perhaps partly due to the 1996 Act) municipalities are seeing an increase in the number of telecommunications providers with few, if any, assets, and often with correspondingly little experience with construction in the public rights-of-way. These facts, combined with the situation where telecommunications providers increasingly operate in a competitive environment (not the monopoly rate of return regulated environment in the past) where providers can go bankrupt and abandon their facilities in an unsafe condition, create substantial concerns for municipalities nationwide.

A related concern is that often the costs of supervising a utility or contractor cannot be predicted in advance. The Commission should be aware that municipalities (like this Commission) often vary their inspection requirements to some degree based upon the

experience and track record with that entity. For example, individual hookups to particular customers may be inspected on only a sampling basis (one in ten, one in twenty) if a utility has a proven track record of excellent compliance with building and electrical code requirements. However, if a utility has developed a reputation for noncompliance, a municipality may greatly increase inspections to the point of inspecting every installation for compliance. Similarly, new providers may be subjected to greater inspection requirements at the outset than an incumbent (which has a good track record) until the track record for the newcomer can be ascertained.

B. Less Than Full Reimbursement a Taking

As is described above, this Commission has no statutory authority to "take" municipal property in violation of the Fifth Amendment to the U.S. Constitution.[15] And as the U.S. Supreme Court has set forth, any requirement that prevents the municipalities from being reimbursed the full costs imposed on them by a telecommunications provider is confiscatory and in violation of the Fifth Amendment to the U.S. Constitution. See e.g. FCC v Florida Power Corporation, 480 U.S. 245, 94 L.Ed.2d 282, 107 S.Ct. 1107, 1112-1113 (1987); St. Joseph Stockyards Company v United States, 298 U.S. 38, 53, 56 S.Ct. 720, 726 80 L.Ed. 1033 (1936); See Permian Basin Area Rate Cases, 390 U.S. 747 at 770, 88 S.Ct. 1134 at 1361, 20 L.Ed.2d 312 (1968). Thus, for example, this Commission's pole attachment fees

[15] The Supreme Court has long ruled that any "permanent physical occupation of real property" is a taking under the Fifth Amendment, and has specifically applied this principle to cable and telephone systems. See Loretto v Teleprompter Manhattan CATV Corp., 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982) and cases cited therein.

survived Supreme Court challenge in Florida Power Corp. only because they covered the entire "additional costs of providing pole attachments."

To the extent this Commission invalidates cost reimbursement, indemnity, insurance or bond/letter of credit provisions such as those in the License Agreement, it violates the "additional cost" standard of the preceding Supreme Court cases because municipalities are not being reimbursed for the "additional costs" imposed on them by a telecommunications provider. Any such result is confiscatory and a violation of the Fifth Amendment.

VIII. CONCLUSION.

In light of the foregoing, the Commission must deny the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nikki Klungle, a secretary at the law firm of Varnum, Riddering, Schmidt & Howlett LLP, hereby certify that on this 6th day of January, 1998, I sent by first class mail, postage prepaid, a copy of the foregoing comments to the persons listed below.

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